

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
: Docket #03cv9685
MCCRAY, RICHARDSON, SANTANA, : 1:03-cv-09685-RLE
WISE AND SALAAM LITIGATION :
: New York, New York
: August 24, 2017
----- : STATUS CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE RONALD L. ELLIS,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: We're in the matter for of a status conference, Anton McCray and parties, 03 Civil 9685. Attorneys, please state your name for the record.

MS. KAREN DIPPOLD: Good morning, Your Honor, Karen Dippold, Beldock, Levine & Hoffman, for the Salaam plaintiffs.

THE HONORABLE RONALD L. ELLIS (THE COURT): Good morning.

MR. JONATHAN C. MOORE: Good morning, your Honor, Jonathan Moore for Santana, McCray and Richardson.

THE COURT: Good morning.

MR. ROGER WAREHAM: Good morning, your Honor, Roger Wareham for McCray, Richardson and Santana.

THE COURT: Good morning.

MS. JANE FISHER-BYRIALSEN: Good morning, Your Honor, Jane Fisher-Byrialsen for the Wise plaintiffs.

THE COURT: Good morning.

MS. GENEVIEVE NELSON: Genevieve Nelson, senior counsel for the City and defendants. Good morning, your Honor.

THE COURT: Good morning.

MR. PHILIP DEPAUL: Good morning, Your Honor, Philip DePaul, senior counsel also for the City and defendants.

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THE COURT: Good morning. Okay, who handed me up this summary?

MS. NELSON: I did, your Honor. It's a revised chart from the one that the parties submitted at the last conference on July 11.

THE COURT: Okay. And do you want to summarize what it's telling me here?

MS. NELSON: Of course, your Honor.

As your Honor will recall, at the June conference your Honor asked the parties to submit a chart with a category of all the documents that need to be reviewed in this process, as well as proposed deadlines not just for the City but for plaintiffs.

The first column in the chart indicates the category of documents. The last two columns indicate the review by the parties. Where it says Completed, it means that those categories of documents have been reviewed by whichever party is indicated here. There are dates on the -- both columns indicate dates by which the parties believe they can complete the review of any particular category of documents.

As your Honor will know, the City has completed its review of all the documents on page 1 except for the first category, which is the deposition transcripts, where

1
2 we coded all of those, and plaintiff got the chance to
3 review those first.

4 As to the second page -- actually, your Honor,
5 if I may just point to No. 14 at the bottom, which is the
6 deduping of all of the documents, the City spent the bulk
7 of their time since the last conference in that process,
8 and we've completed that process and coded any extra
9 copies for dedupe, pursuant to the agreement amongst the
10 parties as to what types of documents could and could not
11 be deduped.

12 For the second page, the City's actually in the
13 process of reviewing and coding category No. 16, and we
14 expect to be done with that shortly. Everything else has
15 a mid-September date, which we -- which the City expects
16 to meet those deadlines. And then there are the deadlines
17 for the plaintiffs, which were agreed upon before the last
18 conference. I know that Ms. Dippold and Ms. Fisher-
19 Byrialsen and their assistants have been working towards
20 completion of the documents assigned to them, which I
21 think is around 15,000 or 16,000 pages of documents each.
22 Mr. Wareham, I believe, started reviewing the production
23 documents this week. It's my understanding that Mr. Moore
24 or his assistant has not started that process yet. In
25 fact, if your Honor will take a look at category No. 2,

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the last column, there are still outstanding deposition exhibits to be completed.

THE COURT: Okay. I'm sorry, which one?

MS. NELSON: No. 2, your Honor.

THE COURT: Deposition exhibits?

MS. NELSON: That's correct, your Honor. There was a deadline requested for June 30. As of yesterday it was reported that there were still deposition exhibits that remain unreviewed and uncoded.

THE COURT: Okay. So the 6/30/17 was the --

MS. NELSON: Was the date that was requested and your Honor --

THE COURT: So that's incomplete?

MS. NELSON: That deadline has passed, and they're still incomplete; that's correct.

THE COURT: Okay. Anything else before I talk to --

MS. NELSON: With respect to the chart, your Honor?

THE COURT: Yes.

MS. NELSON: Or just with respect to the status itself?

THE COURT: Well, why don't you go ahead and complete what --

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MS. NELSON: Sure.

THE COURT: It seems you've indicated that all the things that are listed there you expect to be completed by mid-September, which is, you know, I guess about --

MS. NELSON: About a month.

THE COURT: And you're saying you're on track to do that?

MS. NELSON: We believe we are, your Honor.

THE COURT: Okay. What else did you want to say, then?

MS. NELSON: Well, as I indicated, we're currently reviewing the documents that were produced to both sides by the District Attorney's Office. I have been in contact with the District Attorney's Office; they're aware that we are in that process. They've asked, and we intend to comply as much as we can with the issues and concerns that they raised in their response to the New York Times' motion, which was not very different from what the plaintiffs and defendants wanted. But we wanted to make sure that they knew that we were in that process and that we were reviewing their documents.

That is all I have with respect to the status of the review, your Honor. There might be a few other issues

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that the City might want to raise later in the conference.

THE COURT: Ms. Dippold?

MS. DIPPOLD: There is one change from the prior chart that was presented to your Honor in that originally I was only assigned 933 pages. I've now, as I thought we had originally intended, 15,798 pages to review. I have done almost 2,500 so far. I have two assistants who are working -- one is working on 1,500 pages; the other one I haven't quite received her assignment from FTI yet, but I expect it soon, and I will get her started.

So with respect --

THE COURT: Are you talking specifically about Category 6?

MS. DIPPOLD: Yes. Yes. I'm doing the Armstrong Panel documents. And I know that yesterday I discussed with Genevieve Nelson some of the issues that we're encountering in reviewing these documents, and I'm hopeful that we'll be able to resolve some of those between counsel for the parties without the necessity to involve the Court. We're making efforts to try to make sure that's how it happens so there's the least possible burden on the Court that we can manage.

THE COURT: Okay. And what else is it on your plate on this list as I see that?

MS. DIPPOLD: Well, one thing I'm a little concerned about because I looked at the prior chart. I don't think we expected to complete some of the other things on here. It says, "Complete by mid-September 2017" on the second page and the third page. I don't think it was our expectation that we were going to be able to finish all those tasks by mid-September. But we did expect to start on them by mid-September. And it seems to me kind of odd that some of the things are marked with respect to the City's obligation, "Complete by mid-September," and the plaintiff's, as well, and it hasn't really worked that way before. The way that it has worked before is one side has finished a job, and then the other side does the second-level review.

So I think it's more realistic to think that a good part of September, after we get to mid-September, will be devoted to those particular tasks that are listed on the second and third page and perhaps even the first part of October. So I think that's a more realistic expectation than what appears on this chart. But I, unfortunately, didn't bring the original chart with me, and I don't know if it said that, as well. It may have.

THE COURT: Okay, and you're talking about the things that have contemporaneous completion dates, like 19

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through 24?

MS. DIPPOLD: Well, 15 through 32, all of them are marked "Complete by mid-September."

THE COURT: But they're all not -- well, some of them have both the City and the plaintiffs doing it at the same time; others, the City --

MS. DIPPOLD: That's right.

THE COURT: -- has listed as completed.

MS. DIPPOLD: Your Honor's right. I'm talking about with respect to both sides dealing with the same documents at the same time. It's Category 19 through 26.

MS. NELSON: May I briefly address that, your Honor? And I am happy to provide Ms. Dippold with a copy of the chart that we submitted to the Court on July 11. But the parties met and conferred over every entry in this chart. Plaintiff indicated that they couldn't come up with a realistic date, a date certain, to provide your Honor with respect to those documents that Ms. Dippold is referring to. They chose mid-September. We chose mid-September for our own reasons.

But I want to point out another issue that your Honor should take note of, which is the categories starting at 17. If your Honor look at all of those categories, 17 to -- actually, 17 to 32, your Honor, those

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2 are categories that the parties have either agreed should
3 remain confidential or your Honor has ruled that they
4 remain confidential. There are actually -- with respect
5 to 29, 31 and 32, the parties have conferred on that.
6 We've decided to defer any further conversations about
7 those categories until we're done with all the material
8 documents, which is what's reflected in Footnote 8. All
9 the other documents, the City will be coding those
10 documents. We've already agreed that the majority of
11 these will remain confidential unless they will be
12 relevant to the original investigation and prosecution.

13 The reason plaintiffs is also at mid-September
14 is that they just want to QC the documents -- that's my
15 understanding -- to make sure that there are no other
16 documents in there that they also believe should be
17 disclosed. So these are not going to require the same
18 kind of analysis and coding as what is taking place now
19 with respect to the production documents. Hence the
20 reason we have the same dates.

21 THE COURT: Satisfactory, Ms. Dippold?

22 MS. DIPPOLD: I just wanted to address two
23 issues she raised. One is the last categories, 29 through
24 32. To save time, I suggested to corporation counsel, the
25 Law Department, that -- Ms. Nelson specifically -- that

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2 there was a standard set earlier in our discussions and in
3 our status conferences with the Court that the documents
4 that would be included in the website would be documents
5 that would meet the standard of being admissible. And the
6 training documents, I think there are just a few
7 training -- we're talking about training materials that
8 both the NYPD and the district attorney's office had
9 disclosed during the course of discovery in this case, and
10 I suggested that we focus on those that I think the
11 plaintiffs might actually have sought to use rather than
12 present the Court with -- we expect that there will be
13 need for Court intervention with respect to that issue.
14 So that --

15 THE COURT: Which issue specifically are you
16 talking about?

17 MS. DIPPOLD: Twenty-nine through 32, Training
18 Materials --

19 MS. NELSON: Ms. Dippold, not 30. Not 30.

20 MS. DIPPOLD: Not 30. Okay. So 29, 31, and 32,
21 Training Materials from the NYPD and from the district
22 attorney's office. So rather than have the Court address
23 the number of those training materials received, which
24 was, I would guess, somewhere in the vicinity of perhaps
25 30 or 40 different sets of training materials, that we

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limit what we ask the Court to decide to those issues that the plaintiffs would actually have sought to put into evidence at trial. So that will involve me personally, in this particular instance, looking at those training materials and deciding which ones will require court intervention and which ones will not. I hope to limit it to just perhaps two or three or --

THE COURT: But you don't disagree with the general premise that these won't require the same level of scrutiny and therefore the same investment of time?

MS. DIPPOLD: Well, they'll involve an investment of time because you have to either look at the videos or you have to read the transcripts. So I'm the lucky person who gets to do that, and I've agreed to do that and just to see if we can winnow it down to a reasonable number of training programs to ask the Court to determine whether or not they should be included on the website.

MS. NELSON: Your Honor, just a bit of correction. Categories 17 through 28 are the ones that would require very little review from plaintiffs once they're submitted to them for review. There has been no agreement as to 29, 30 and 31, which is what Ms. Dippold just addressed.

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MS. DIPPOLD: And it is --

MS. NELSON: And that is going to take a significant amount of time, not only to review the documents but to prepare an application for your Honor, which is why I thought the agreement was we wouldn't be addressing this issue and we would wait to see how much time is left after the review of all of the relevant documents before we address that issue further.

THE COURT: Okay. All right, so the bottom line, then, from you, Ms. Dippold, is mid-September, too optimistic?

MS. DIPPOLD: Yes, that is the bottom line, although I have to agree with what Ms. Nelson just said about categories 17 through 22, for example. I mean, they involve our clients' and other individuals' employment records, medical records, education records, insurance records, Social Security Administration, tax records. We have already agreed that those documents will not be included. And I believe that the Court has ruled with respect to some of those documents that they will not be included. So it's simply a matter of us taking a look at them, rather than coding them in the way we have done, and making sure that the documents that are included within those categories are appropriately categorized.

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THE COURT: Okay, well, do this for me, then. I want to know what on this chart specifically you would be working on. I know you mentioned the Armstrong documents.

MS. DIPPOLD: Yes. On the first page, that we tried to divide things equally. So that's one of the largest assignments. So that basically is all on the first page that I personally will be working on.

THE COURT: Okay.

MS. DIPPOLD: ON the second page, certainly I will be looking at all the documents that fit into these categories from 15 down to, I think -- it may be a bit further, but I think down through 24 I'm going to be looking at them, at these documents, to the extent they involve the Salaam plaintiffs because they are documents that were -- there are documents in each of these categories that were produced with respect to each of the plaintiffs. So I'm familiar with the Salaam productions, and I'll be doing the Salaam productions.

THE COURT: And with respect to those tasks, you're asserting that, rather than mid-September, what time frame?

MS. DIPPOLD: I think it will probably be a week or two -- realistically speaking, given how much time it takes to do this, I would say realistically it probably

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would take till the second week of October to finish all the remaining review tasks that are listed on this document -- with respect to the Salaam -- I'll limit it -- with respect in certain categories, I'll limit that to the Salaam plaintiffs. I know Ms. Fisher-Byrialsen will be looking at the documents for the Wise plaintiffs, and I think that perhaps it's simplest for each of us to do those documents that were produced on behalf of our clients.

THE COURT: And what about page 3?

MS. DIPPOLD: Page 3, some of these -- for example, the disciplinary files, the NYPD disciplinary files, we know those are going to be eliminated. So similarly to what we're talking about with respect to the plaintiffs' document productions or the plaintiffs' tax records, this is simply a matter of looking at these 2,711 documents to determine whether they are properly categorized as disciplinary documents. So we're not probably going to be coding them; we're going to be looking at them and saying, "Yes, we agree these are disciplinary files that will not be included in the website."

THE COURT: I'm mainly interested in -- to the extent that it's not going to be a simple process,

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completion date? Similarly you're talking -- you're asserting the second week in October?

MS. DIPPOLD: For my -- for tasks that I think are on my list, that's what I would estimate.

THE COURT: All right. Ms. Fisher-Byrialsen?

MS. FISHER-BYRIALSEN: I agree with what Ms. Dippold -- and you're right, Ms. Grant and I are all done with everything except for Category No. 9 that's on the first page. I would say we are about -- I would guess we have about 9,000 left in Category 9 on page 1. Otherwise, I'd agree with Ms. Dippold.

THE COURT: Okay, Mr. Wareham?

MR. WAREHAM: I don't think that the September 15 deadline is going to be realistic for me. I just -- my timetable is thrown off because I have two very close relatives that passed in the last three weeks. And (indiscernible) so I'm behind, and I've barely begun the 16,000 documents.

THE COURT: Which one is yours?

MR. WAREHAM: I have Category 7, Category 11 and Category 8.

THE COURT: Okay.

MS. FISHER-BYRIALSEN: I have 7, all of 8 and all of 11.

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MR. WAREHAM: Right. So I think realistically I'm shooting for the first week in October to have that completed.

THE COURT: That's just the first page we're talking about?

MR. WAREHAM: That's the first page, yes.
And the second page, I think, is similar to what Ms. Dippold had laid out, which shouldn't require as much scrutiny.

MS. NELSON: Your Honor?

THE COURT: Yes.

MS. NELSON: Categories 15 and 16 have not yet been assigned with respect to individual plaintiffs/defendants. It's my understanding from Ms. Dippold's representation that Ms. Dippold will take care of those documents that are for her clients. But then it then remains that for the Richardson, McCray and Santana documents, if that's the agreement amongst the parties, then those have to be divided between Mr. Moore's group and Mr. Wareham, and those are going to require significant review and coding.

THE COURT: Are we just talking about 15 and 16 now?

MS. NELSON: Correct, your Honor, which is about

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40,000 pages of documents.

THE COURT: What say the plaintiffs on this?

MR. WAREHAM: Forty thousand is the total for all five plaintiffs.

THE COURT: But it hasn't been assigned or delegated?

MR. WAREHAM: No, we have not assigned that. We'll have to sit down and determine and break that out.

THE COURT: Okay, well, what else is already assigned to you, then? I mean, the general things that Ms. Dippold said that each plaintiff will be looking at based on their representation?

MR. WAREHAM: We have not spoken about that. We will resolve that between now and the next status conference.

THE COURT: Okay.

MR. WAREHAM: We're just also handicapped since Mr. Warren is no longer part of this group.

THE COURT: All right, Mr. Moore?

MR. MOORE: According to my records, we had, as of last status conference, we had 21 deposition exhibit list assignments to review. I believe as of today we've completed 14 of those 21, including all of the named plaintiffs. And that review is ongoing. I expect that

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2 that will be completed by the end of the month, based upon
3 the pace that we've been maintaining so far.

4 That leaves Category 7 and Category 10, which is
5 almost -- well, it's over 16,000 documents, which
6 according to this have to be reviewed by September 15. We
7 will, as soon as we finish reviewing these deposition
8 exhibits, we'll turn to that; and, you know, hopefully
9 we'll make good progress on it.

10 With respect to Category 17 through 26, this is
11 the first time I've heard of this arrangement that these
12 categories of documents that Ms. Fisher-Byrialsen and
13 Ms. Dippold will be reviewing those documents only for
14 their client. It seems like a very inefficient method of
15 review to have five people review the same set of
16 documents five times. So I don't --

17 THE COURT: Well, you all can talk about that.
18 I'm just getting a --

19 MR. MOORE: So, anyway, I haven't even --
20 there's been no plans made by me to review those
21 categories of documents from 17 to 26. And I will talk to
22 my co-counsel about a more efficient way of trying to
23 review those documents because it seems to me that
24 although it may not be your client, I mean, if you have a
25 view that a certain document should be, you know,

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2 confidential, kept confidential, a medical record or
3 whatever, it's going to apply across the board to
4 everybody. That doesn't seem -- particularly if the
5 review is being assigned out, not being done by
6 Ms. Dippold but assigned to paralegals in her office, it
7 seems to me that that all could be done -- that could be
8 done for everybody. But we'll talk about that. I wasn't
9 even aware that that was the intention before I came here
10 today, so --

11 THE COURT: Okay, well, here's where we stand.
12 Obviously, ultimately, the Court has to make a decision on
13 this. As of October 15, if anyone wants to de-designate
14 anything, they'll have to make that known to me. As of
15 October 15, if the City has indicated that documents be --
16 has completed their review, then I will take that as a
17 proposal from the City that that's the appropriate de-
18 designation. If any of the plaintiffs want to say
19 something different from what the City is saying, they
20 will let me know by October 15. I will spend October 15
21 through the end of my term trying to reconcile that. So
22 if you have any disagreements, I'll need to know about
23 them by October 15, however you want to work that out.

24 But -- and I recognize that each side has their
25 concerns, but ultimately, each side has to take

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2 responsibility for its own concerns. Hopefully you'll
3 have completed everything that's specifically related to
4 the clients that you represent; but, obviously, there are
5 concerns that go beyond that. But as we discussed the
6 last time, we can't just keep letting things slip. And so
7 wherever you are on October 15, that's when I take over.

8 So if you want to work between now and then to
9 agree on anything, that's fine. If you disagree on
10 anything, I want to know what the disagreements are as of
11 October 15, and I will rule on the disagreements. So
12 whatever you think is fair in terms of the burden, in
13 terms of working this out, your responsibility is to
14 figure that out yourselves.

15 But my responsibility ultimately is to determine
16 whether or not these documents need to be put -- made
17 available to the public. And as counsel are aware, we
18 could have done a more streamlined approach in which I
19 could have just asked you to tell me what your
20 disagreements were. Giving you the opportunity to look at
21 the documents and to do the coding I think wasn't
22 absolutely necessary in terms of this, but wherever we
23 stand, that's where we're going to pick up.

24 Any questions? Ms. Dippold?

25 MS. DIPPOLD: One of the things that I'm seeing

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2 as I go through these 15,000 documents is how many of them
3 are copies. I'm seeing the same statements over and over
4 again. And especially with respect to the documents we
5 were just talking about, things like our clients' medical
6 records and things like their employment records, I'm
7 wondering if there isn't a way where the technical company
8 that we're working with couldn't arrange for us to
9 actually -- for example, if I'm looking at medical records
10 for one of the plaintiffs -- the Salaam plaintiffs, why
11 shouldn't I be able to simply delete that document from
12 the category of documents to that Mr. Moore does not have
13 to even see that document? And I'm wondering if the City
14 couldn't investigate and see if there's a way for us to
15 resolve that problem? It would eliminate an enormous
16 number of documents, page-by-page documents that we're
17 looking at.

18 THE COURT: Okay. Obviously, I'm going to allow
19 Ms. Nelson to respond, although let me tell you where we
20 are now is I have -- I've been open to any suggestions of
21 things that could streamline this. So any suggestions
22 that the parties had once they started looking at this,
23 they could have presented to the City and to me at any
24 time over the course of this year. And so you're still
25 free to do that, but it still remains -- you know, it's

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maybe something that could have been brought up earlier.
At this point, there is -- we're not going to be able to
change the time/space continuum, but this is going to get
done.

Yes?

MS. NELSON: Your Honor, the City has been open.
We've exchanged, particularly with Ms. Dippold and
Ms. Byrialsen, very creative ways to limit the amount of
documents that will be reviewed. One of the processes
that was proposed was deduping the entire database, which
the City took on that endeavor and we completed it. As I
reported earlier, we completed it in this last period
between the July 11 conference and today.

We informed plaintiff, even before we went on
this process, that because of the types of documents that
we're talking about, the age of the documents, the
different kind of medium -- some are typed, some are
handwritten -- it is difficult for an electronic database
to dedupe. We had to do that manually by looking at each
document at a time. We've completed that. That being
said, plaintiffs still asked that those documents be
included in their set of documents that they will be
reviewing so that they can make sure that the proper
application was made. So to the extent they're seeing

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documents over and over, it's by their request.

I will also say, your Honor, plaintiff, so as not to slow down this process, Ms. Dippold and Ms. Fisher-Byrialsen started reviewing documents even before the deduping process was completed. So they might be seeing duplicates now that they wouldn't -- they would have been seeing duplicates in the last six weeks that they wouldn't see now.

THE COURT: Okay. Well, I'm here to resolve disputes, and anything that the parties want to work out given the constraints that you're going to have to work under now, feel free to talk about it. If you disagree with something that you believe I need to weigh in on, I want to hear each of your positions, and I'll decide it -- decide it without delay, hopefully. But procedure as to how you do the review, who does the review, that's not a legal dispute that I need to get involved in. All I need to let you know is that what we have is we have things that have been designated, and the question is whether or not some of those things need to be de-designated. If one party thinks they ought to be de-designated or insist that other documents ought to be kept confidential, then they make that known. If there's a dispute, I decide it.

Given the volume that we're talking about,

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2 certainly it's a task that requires some commitment, some
3 allocation of resources. How you do that I did not weigh
4 in on. So everybody has their jobs to do. You know,
5 sometimes people tell me, "Well, you know, I don't have
6 time to learn Spanish," or whatever it is. And I say,
7 "You know, you have time to do almost anything you want.
8 You just have to decide how you're going to prioritize
9 it." And at this point you have to prioritize this
10 endeavor. We've been sort of -- the deadlines have
11 slipped. But as we said at the last conference, there's
12 only so much you can build in in terms of the leeway
13 that's available here.

14 It's certainly my intention that before I leave,
15 we're going to decide this issue of what's de-designated.
16 And anything that's in front of me on October 15, I will
17 consider fair game; otherwise, I'll leave it to my own
18 devices. And that includes -- I mean, we did -- some
19 things we did by category, some of which you agreed to.
20 But the -- there was the main question that needs to be
21 decided, and that is, is this going to be a default for
22 disclosure or is the default going to be that it is going
23 to stay designated? I actually haven't heard the parties'
24 positions on that. If you have some thoughts on that now,
25 this would be a good time to make them known so that there

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are no surprises. We'll start again with Ms. Nelson.

MR. MOORE: Judge, before you do that, I have another appearance in the building before Judge Woods.

THE COURT: What time?

MR. MOORE: Well, it's at --

THE COURT: That's Woods or Wood?

MR. MOORE: -- after meeting with my client; we're having a preliminary injunction hearing. I mean, I'm happy to stay if you want, but --

THE COURT: Well, "happy," I think when you're in front of a Court, "happy" is not the actual word.

MR. MOORE: I would like to be excused since I've reported what I have done, and I have -- you know --

THE COURT: Okay. Again, we're talking about going forward in the future. You are responsible for anything that happens in your absence, of course.

MR. MOORE: Well, most of it has been going on in my absence, anyway, so I understand I'm responsible for it.

THE COURT: Okay. So you're asking to be excused. All right, you understand the topic that we're going to discuss now?

MR. MOORE: I understand, your Honor.

THE COURT: All right, you may be excused,

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Mr. Moore.

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Ms. Nelson, what do you think the default ought to be?

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MS. NELSON: Well, your Honor, I will say this much: Since the start of this process, the City has been advocating that the default should always be any documents relevant to the original prosecution and investigation. We've reviewed the documents with an eye towards that. Any information, whether salacious, tangential, we've looked at it all with that one theme in mind, whether it's relevant to the original investigation and prosecution. Anything else has been eliminated and will remain confidential. And to the extent there are documents that are relevant to the original investigation and prosecution and a privilege applies or there's some privacy concerns, we've conferred with plaintiff, and for the most part, we've come to some agreement. There's clearly been some litigation before your Honor with respect to that issue, the employment records, personnel file, disciplinary issue. All of those, we've always had the same theme: They are not relevant to the original investigation and prosecution. There are also statutes that apply; they should remain confidential. So for the City, your Honor, for the entirety of this process, that, for the most part,

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2 has been our default. And we've tried to stay true to
3 that.

4 THE COURT: So in your review, you've tagged
5 things that needed to be -- I have to tell you that I'm
6 not exactly sure what the parties have been doing --
7 you've been tagging things for the purpose of saying that
8 they're free to be or tagging things to say they should be
9 reserved and not?

10 MS. NELSON: So when it was decided that both
11 sides would engage in this process because we couldn't
12 agree on particular categories, we set up the database so
13 that you can code for both: These documents will remain
14 confidential; these documents will be disclosed to the
15 public. To the extent they're going to remain
16 confidential, there is a dropdown menu of things that must
17 be -- at least one must be checked in order for there to
18 be some justification as to why the documents should
19 remain confidential. And we've taken this position
20 throughout. All our letter applications to the Court has
21 mentioned this; all the category charts that we've
22 submitted to the Court, including the initial one, has
23 mentioned it. It's certainly the thing that we bring up
24 in conversation to the plaintiff whenever we meet and
25 confer over any particular dispute.

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THE COURT: And so how will I know which things are in dispute?

MS. NELSON: Well, your Honor, that I'm going to then assume, to the extent we haven't already brought it to your Honor's attention, as we did with the employment records, my understanding from your Honor's instruction is that we have to inform the Court before October 15 as to what else there's going to be. I know Ms. Dippold, Ms. Fisher-Byrialsen, Mr. DePaul and I meet very regularly, certainly in advance of any court conference to decide whether there are any issues that we must address amongst ourselves or with the Court. And I think that is going to continue to happen with more frequency. We certainly invite Mr. Wareham and Mr. Moore, considering one of his complaints is things happening without his knowledge, we invite them to join in the meet-and-confers. They've been very amicable. As to anything we can't agree on, we bring it to your Honor's attention. And that's the process that we've been engaging in.

However, the City's default has always been if it's not relevant to the original investigation and prosecution, it should remain confidential with certain exceptions to privilege or applicable statutes.

THE COURT: Okay, and before we go on, just

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housekeeping, just looking at my calendar, I see that actually mid-October, October 13 is a Friday and the 15th is a Sunday. So you can consider that date to be October 13, oddly enough, Friday the 13th. I hope that's not ominous.

MS. NELSON: Can we have the Monday, your Honor, for superstitious reasons, as well as the parties will get the extra two days to finalize anything to bring to your Honor's attention.

THE COURT: Well, we could take care of the superstition by making it the 12th.

MS. NELSON: Okay. That's fine with us, your Honor.

THE COURT: I'd rather have -- I mean, look, I'll give you the 12th. If you're still working on stuff and, you know, there's some cleanup --

MS. NELSON: Of course.

THE COURT: -- I'll let you clean up by Monday. But I want the bulk of this by the 12th.

MS. NELSON: Understood.

THE COURT: Because I don't have the luxury of just pushing it out --

MS. NELSON: Understood, that, as well.

I'm not sure if I responded adequately to your

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Honor's inquiry about a default position.

THE COURT: I understand the City's position.

Ms. Dippold?

MS. DIPPOLD: Well, it was my intention to have this wrapped up, so I hadn't considered what will happen if in fact there are documents that have not been the subject of a review and dealt with by both sides. I think, given the nature of some of the documents I see, though, we would have to lean toward the idea that they would not be disclosed, because there certainly are things in these documents that are very sensitive and that would be embarrassing or even worse with respect to the parties, some of the parties, some of the witnesses. And I think that would probably be the position we would take, that they should not be included in the website and they should not be disclosed.

MS. NELSON: We've never disagreed with that, your Honor. In fact, many of the agreements amongst the parties is about information that would tend to either embarrass or harass either a party or a non-party.

THE COURT: Indeed, it was my impression that the City's idea that only things that were relevant to the initial investigation was more restrictive than the plaintiffs wanted or that the media wanted in terms of

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2 disclosure.

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MS. NELSON: That's correct, your Honor. We've kept all of these other issues in mind, but if we're talking about a strict default, if we have -- when we're coding the documents, we have to weigh whether something should remain confidential or not. That's the default position. We start there, and then we see if anything else should apply: privacy, privilege, statute. It's one of the reasons why we wanted to start with the categories of documents that are listed on the first page of the chart because we believe that those are the most relevant. That through, I think, Category 16 is the most -- for us are the most relevant documents. And so we wanted to review those first, knowing that plaintiff would have to review them after us, and we wanted them to get the bulk of the relevant information for their review.

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THE COURT: Ms. Fisher-Byrialsen, do you want to weigh in on this? Are you still there?

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MS. FISHER-BYRIALSEN: Well, your Honor, I'm just dealing with having -- I mean, I guess my position would be that if it were not done by that date, that you look at the things that actually are in dispute and then you're ruling on those. And if they're documents that have not been reviewed at all, I mean, other than my

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clients' medical records, my sort of opinion in this case has always been that all of it should be public. And, I mean, I realize that that's not a possibility, but my position would be that -- to err on the side of making things public.

I can give you an example of things that have been coded so far and are in dispute based on my having done coding after the City is there is, for example, some news articles dealing with some of the police officers', I guess, allegations or criminal cases that have been brought against some of the defendant police officers in this case that the City has marked confidential that I don't believe newspaper articles and things that have already been in the public eye should be confidential. I've gone through hundreds of letters to ADA Lederer where the -- it seems that the City's position was that if the letter was a letter of congratulations and praise back in the '90s to Ms. Lederer, then that should remain public; whereas, the bulk of the hate mail she --

MS. NELSON: Your Honor --

MS. FISHER-BYRIALSEN: -- received was to be marked --

MS. NELSON: -- may I stop Ms. Fisher-Byrialsen?

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THE COURT: Ms. Fisher-Byrialsen? Ms. Fisher-Byrialsen?

MS. FISHER-BYRIALSEN: -- to the point of your Honor looking at that --

THE COURT: Ms. Fisher-Byrialsen? I guess we --

MS. FISHER-BYRIALSEN: Yes?

THE COURT: Okay.

MS. NELSON: To the extent Ms. Fisher-Byrialsen is going to be discussing confidential material, I would suggest, your Honor, that we meet and confer first and that we put in an application. I understand Ms. Fisher-Byrialsen is appearing by phone, but I wasn't quite sure how far down this road she was going, and I thought I should caution that any information about confidential materials we probably should discuss amongst the parties first before we bring it to your Honor's attention.

THE COURT: Okay. Well --

MS. DIPPOLD: As a matter of fact, I would add that Ms. Nelson and I just had a conversation about this very issue yesterday, and it's unresolved, but it is an issue that if in fact we're not able to resolve, we'll be asking your Honor to weigh in on.

THE COURT: Okay. Well, tee it up timely, and we'll get to it.

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All right, I just want you to understand that these are the kind of things that the Court will be dealing with. I had hopes and I gave you the leeway in part because I had hoped that, as Ms. Nelson and I assume other counsel did, that the process would be completed. But while hope springs eternal, realism still has to be taken into account. And the pace here just has not kept pace with the expectations. So we'll deal with it as it presents itself. There really wasn't much of an alternative to doing it the way we were doing it, but as I said, we shall see.

I guess the best way to deal with this is to have another conference scheduled. Well, one obvious date would be October 16. The problem with that is it wouldn't give me the opportunity to know if there were any problems. So if we could do --

MS. NELSON: The end of September, your Honor?

THE COURT: -- that last week in September?
Anybody going to be gone?

How about Thursday, September 28, 10:30?

MS. FISHER-BYRIALSEN: That would be fine, your Honor. May I appear by phone?

THE COURT: Yes.

I will see you then.

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MS. NELSON: Just one last issue, your Honor.

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THE COURT: Yes.

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MS. NELSON: Actually, not even an issue. Just a report. As we're coming to the close of this process, the City has refocused on the website and where the documents will appear. We still believe it will be NYC.gov. However, we're now told we have to retain a web service at the City's cost to not only maintain the website but for storage of the information that is going to be put on this website. We're also seeing copyright concerns with respect to some of the media information that we have, newspaper articles, news programs. We're exploring whether we can -- whether fair use might be a way to get around that. But we're still exploring all of those issues. But I wanted to present to your Honor that that is part and parcel of what the City has been working on since the last conference.

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THE COURT: Okay. In that regard, if you're planning to put anything from the media on the website, I would assume that you're going to talk to somebody in the media to determine whether or not they think that's a good idea.

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MS. NELSON: We have our legal counsel who deal with this issue -- Legal Counsel Division, who deal with

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this issue all the time; they are researching whether or not that is required or whether what we need to do is watermark those documents to show the original source or whether, quite frankly, the fair use defense is applicable here. But it's something that we've started working on so as not to delay this at the back end.

THE COURT: Okay. Who knows, maybe the media likes to have their things in that, you know, more eyes, more views.

MS. NELSON: Yes, it's not something I'm particularly familiar with, so I leave it to the experts.

THE COURT: Okay. All right. We'll be adjourned.

MS. NELSON: Thank you, your Honor.

(Whereupon the matter is adjourned to September 28, 2017, at 10:30 AM.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, McCray, Richardson, et al., Docket #03cv9685 was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

CAROLE LUDWIG

Date: September 13, 2017